92-1821

Supreme Court, U.S.
FILED
MAY 14 1993

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LOUIS R. KOERNER, JR.,
MOVANT, APPELLANT, PETITIONER

VERSUS

INTERNATIONAL COFFEE CORPORATION
AND
CARLOS L. NOTTEBOHM
DEFENDANTS, APPELLEES, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LOUIS R. KOERNER, JR., ESQ.
OF THE LOUISIANA BAR
PRO SE
1204 JACKSON AVENUE
NEW ORLEANS, LA 70130-5130
(504) 581-9569

60 pp

QUESTIONS PRESENTED FOR REVIEW

May a court of appeal, in the interest of judicial economy, review a judgment deciding both the merits of the case as well as an interlocutory order holding a party liable for attorney's fees under Rule 11, but not quantifying the amount of those fees?

May a district court levy sanctions against a party's attorney after the parties have settled their dispute and agreed not to pursue each other for attorney's fees?

May a district court refuse to determine whether a person's liability to a party for sanctions is reduced by that party's settlement and receipt of money from another party also liable for the same sanctions?

PARTIES TO THIS PROCEEDING

Petitioner/Counsel for plaintiff:

Louis R. Koerner, Jr.

Respondents/Defendants:

International Coffee Corporation
Carlos L. Nottebohm

Plaintiff:

Old Time Enterprises, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

REFERENCES TO DECISIONS BELOW vi

GROUNDS FOR JURISDICTION vii

STATUTE INVOLVED viii

STATEMENT OF THE CASE 1

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI 4

I. THE FIFTH CIRCUIT LACKED JURISDICTION TO AFFIRM THE DISTRICT COURT'S DECISION TO AWARD UNQUANTIFIED SANCTIONS 5

A. Circuits which have expanded their statutory jurisdiction 7

B. Circuits remaining within statutory jurisdictional limits . . . 12

II. EFFECT OF SETTLEMENT ON JUDGMENT SANCTIONING COUNSEL FOR A SETTLING PARTY 15

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Andrews v. Employees' Retirement Plan of First Alabama Bancshares, Inc., 938 F.2d 1245 (11th Cir. 1991). 11, 12

Becton Dickinson & Co. v. District 65, United Automobile, Aerospace & Agricultural Implement Workers, 799 F.2d 57 (3d Cir. 1986). 12

Bittner v. Sadoff & Rudoy Industries, 728 F.2d 820 (7th Cir. 1984). 10, 11, 14

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981). 5

Herschinow v. Bonamarte, 735 F.2d 264 (7th Cir. 1984). 10, 14

Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976). 5

McDermott, Inc. v. Clyde Iron, 979 F.2d 1068 (5th Cir. 1992). 18

Morgan v. Union Metal Manufacturing, 757 F.2d 792 (6th Cir. 1985). 9, 10, 14

Myers v. Gilman Paper Corp., 544 F.2d 837 (5th Cir. 1977). 12

Old Time Enterprises, Inc. v. International Coffee Corp., No. 89-3763, slip op. (5th Cir. July 12, 1990) (per curium). . 7

Pennsylvania v. Flaherty, 983 F.2d 1267 (3d Cir. 1993). 2, 12, 13

Perkins v. General Motors Corporation, 965 F.2d 597 (8th Cir. 1992). 17

Phelps v. Washburn University, 807 F.2d 153 (10th Cir. 1986). 14

Riverhead Savings Bank v. National Mortgage Equity Corporation, 893 F.2d 1109 (9th Cir. 1990). 16

Southern Travel Club, Inc. v. Carnival Air Lines, Inc., 986 F.2d 125 (5th Cir. 1993). 6, 13

Stewart v. Baldwin County Board of Education, 908 F.2d 1499 (11th Cir. 1990). 12

Suslick v. Rothschild Securities Corp., 741 F.2d 1000, (7th Cir. 1984). 10

Williams v. Fab-Con, No. 92-3320, slip op. (5th Cir. May 6, 1993). 18

Statutes, articles and rules

28 U.S.C. § 1254(1). vii

28 U.S.C. § 1291. . . . . viii, 5, 10, 12

28 U.S.C. § 2101(c). vii

Federal Rule of Civil Procedure 11. . . . . 7, 20

REFERENCES TO DECISIONS BELOW

TRIAL COURT:

Old Time Enterprises, Inc. v. International Coffee Corp., (No. 89-1371, United States District Court, Eastern District of Louisiana, judgment rendered August 18, 1989). Unreported.

Old Time Enterprises, Inc. v. International Coffee Corp., (No. 89-1371, United States District Court, Eastern District of Louisiana, order and reasons rendered October 25, 1989). Unreported.

Old Time Enterprises, Inc. v. International Coffee Corp., (No. 89-1371, United States District Court, Eastern District of Louisiana, minute entry of September 10, 1991). Unreported.

APPELLATE COURT:

Old Time Enterprises, Inc. v. Browning, (No. 89-3763, United States Court of Appeals for the Fifth Circuit, district court judgment affirmed on July 12, 1990). Unreported.

Old Time Enterprises, Inc. v. Browning, (No. 91-3870, United States Court of Appeals for the Fifth Circuit, district court judgment affirmed on January 5, 1993). Unreported.

GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C. §§ 1254(1), 2101(c). The United States Court of Appeals for the Fifth Circuit rendered the decision below on January 5, 1993 and denied the application for rehearing on February 16, 1993.

STATUTE INVOLVED

28 U.S.C. § 1291:

Final decisions of district courts

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

On March 28, 1989, Louis R. Koerner, Jr., petitioner and attorney of record for Old Time Enterprises, Inc. ("Old Time"), filed a petition in the United States District Court for the Eastern District of Louisiana on behalf of Old Time against International Coffee Corporation, Inc. ("ICC") and others. The petition alleged RICO violations and invoked the court's federal question jurisdiction. On August 18, 1989, the district court dismissed the petition and imposed sanctions under Rule 11, Fed. R. Civ. P., against Old Time "for those costs incurred due to plaintiff's failure to conform to the court's RICO Standing Order." Neither the judgment nor the order and reasons accompanying the judgment quantified the amount of attorney's fees. In fact, the court stated that it would fix the amount of sanctions after a contradictory hearing on motion of defendants. On October 25, 1989, the trial court denied Old Time's motions to amend the petition and to reconsider the dismissal with sanctions. At that time, the trial court also

dismissed Nottebohm's motion for a protective order and additional sanctions as moot.

On October 30, 1989, Old Time filed its notice of appeal. On November 14, 1989, Koerner amended the notice of appeal to include himself as an appellant, out of an abundance of caution, even though no judgment had been rendered against him and he was not a party to the litigation. The United States Court of Appeals for the Fifth Circuit affirmed both aspects of the district court's decision, *i. e.*, the dismissal on the merits and the imposition of Rule 11 sanctions on July 12, 1990. In its *per curium* opinion, the court did not address the issue of whether it had jurisdiction to consider the interlocutory decision to assess an unspecified amount of attorney's fees against Koerner.[1]

---

[1]Although neither party contested jurisdiction on appeal, the Fifth Circuit could have raised the issue *sua sponte*. Pennsylvania v. Flaherty, 983 F.2d 1267, 1275 (3d Cir. 1993).

Meanwhile, Old Time, ICC, and the individual parties settled their differences; ICC dropped its pursuit of attorney's fees from Old Time and the president of Old Time, Jack Bolanos, but reserved the right to seek sanctions from Koerner. The district court approved that settlement on January 9, 1991, over the objection of Koerner who argued that he was entitled to attorney's fees based on his contingency fee contract with his clients. At an evidentiary hearing to fix the amount of the sanctions, Koerner objected to the imposition of sanctions against himself on the grounds that the judgment declaring that sanctions would be awarded named Old Time as the only party responsible for the sanctions. Koerner also argued that he was entitled to a credit or pro rata reduction based on Old Time's payment to ICC to settle their differences, including the sanction award. On September 10, 1991, the district court levied $25,000.00 in attorney's fees against Koerner, to be divided equally between ICC and Carlos L. Nottebohm. The Fifth Circuit affirmed this decision on January 5, 1993 and

denied Koerner's application for rehearing on February 16, 1993.

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

A writ of certiorari should be granted in this case for the following reasons:

(1) This decision is in conflict with other decisions of various federal circuit courts of appeal on the same matter.

(2) The Fifth Circuit departed from accepted and usual course of judicial proceedings and sanctioned such a departure by the district court.

(3) This decision represents an important question of federal law which has not been, but should be decided by this Court.

I. THE FIFTH CIRCUIT LACKED JURISDICTION TO AFFIRM THE DISTRICT COURT'S DECISION TO AWARD UNQUANTIFIED SANCTIONS

The appellate jurisdiction of the Fifth Circuit in the instant case rested on 28 U.S.C. § 1291, which requires that a decision be final before an appellate court reviews that decision. A decision is final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373, 101 S.Ct. 669, 673, 66 L.Ed.2d 571 (1981). Conversely, a decision is not final within the meaning of 28 U.S.C. § 1291 if it simply determines liability, but reserves the assessment of damages for a later date. *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 742-44, 96 S.Ct. 1202, 1206, 47 L.Ed.2d 435 (1976). It would seem beyond dispute that the portion of a judgment awarding sanctions, but deferring the computation of those sanctions, is unappealable, even if it is coupled with a final decision on the merits. It should then follow that an appellate court decision affirming such an order

is without effect, because the appellate court had no jurisdiction to consider the order in the first place.

Despite the seeming inescapability of this conclusion, the circuits are split on the issue of whether they may exercise jurisdiction over an appeal which contests both the merits of the case and an unquantified award of attorney's fees. Some, in the name of judicial economy, have carved an exception to the rule requiring a final judgment and held that the interlocutory order granting attorney's fees may be reviewed on appeal if it is consolidated with an otherwise appealable, final judgment on the merits of the case. Other circuits have declined to create a judicial exception which would extend their statutory jurisdiction to include unappealable issues. The Fifth Circuit has rendered decisions in both directions. In the instant case, which involved both the merits and sanctions issues, it reviewed both the merits and the liability issue of attorney's fees although the damages issue had not been determined. In *Southern Travel Club, Inc. v. Carnival Air Lines, Inc.*, 986

F.2d 125 (5th Cir. 1993), the Fifth Circuit reviewed the merits of a district court judgment, but refused to review an order granting a motion for unspecified sanctions.

A. Circuits which have expanded their statutory jurisdiction:

Fifth Circuit

As noted above, the Fifth Circuit in the instant case affirmed the district court's judgment which awarded, but did not quantify, attorney's fees under Rule 11, Fed. R. Civ. P. *Old Time Enterprises, Inc. v. International Coffee Corp.*, No. 89-3763, slip op. (5th Cir. July 12, 1990) (per curium). The court did not even address whether it had jurisdiction to consider the issue of liability for attorney's fees separate from the damages issue. It is possible that the court was unconscious of the existence and implications of that silent issue. Nevertheless, because the issue is jurisdictional, it must now be considered.

If this Honorable Court should find that the Fifth Circuit improperly considered the issue of liability for attorney's fees, then that portion of the affirmance should be vacated as null and void. Because the parties settled their dispute and dispensed with the entire law suit before a final judgment existed as to attorney's fees, no sanctions should have been imposed. On the other hand, if this Honorable Court should determine that the Fifth Circuit properly consolidated an unappealable issue of attorney's fees with the final, appealable issue on the merits, then the Fifth Circuit's affirmance became the law of the case and binding on the district court. Because the judgment affirmed by the Fifth Circuit assigned liability specifically to Old Time, without mentioning its counsel, Louis R. Koerner, Jr., the district court was not at liberty to ignore the Fifth Circuit's affirmance of attorney's fees against Old Time.

Sixth Circuit

In *Morgan v. Union Metal Manufacturing*, 757 F.2d 792 (6th Cir. 1985), the court was faced with several issues regarding appellate jurisdiction. As in the instant case, the district court simultaneously dismissed the plaintiff's petition and held that the defendant was entitled to costs and attorney's fees. The court then allowed the defendant thirty days to submit an itemization of its costs and fees. Realizing that the holding of liability for attorney's fees was not a final judgment, the plaintiff waited to file his notice of appeal until the district court awarded damages. In doing so, the Sixth Circuit held that the plaintiff lost his right to appeal the merits of the case because he filed his notice of appeal late. Moreover, the court noted that the plaintiff could have consolidated an appeal from the determination of liability for attorney's fees with the appeal from the merits. The court reasoned, "[T]he court's jurisdiction over the appeal on the merits carries with it the authority to determine the liability for fees." *Morgan*, 757

F.2d at 796 (citing *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 826-27 (7th Cir. 1984); *Suslick v. Rothschild Securities Corp.*, 741 F.2d 1000, 1006 (7th Cir. 1984); *Herschinow v. Bonamarte*, 735 F.2d 264, 266 (7th Cir. 1984)).

Seventh Circuit

As the Sixth Circuit indicated in *Morgan*, the Seventh Circuit decisions provide fertile ground for the growth of appellate jurisdiction under 28 U.S.C. § 1291. In *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820 (7th Cir. 1984), the court justified its exercise of jurisdiction over an otherwise unappealable order "in the interest of orderly judicial administration". *Id.* at 826. The court's primary goal in resolving the issue was to avoid multiple appeals. The court acknowledged the possibility that there may be another appeal after it reviewed the liability issue. However, it noted that even if it waited, it might have to decide two fee appeals--first, the quantum for the work in the district court, and later, the quantum for the work in the appellate court. Therefore, the

court opted for deciding the liability issue and, if affirmed, pointed out that the district court could then make a single award covering both the district court and the court of appeals proceedings. At that point, the appellant could appeal the single quantum of attorney's fees. Ultimately, the court made the following admission:

> The sad fact is that there is no sure way of preventing multiple appeals in a case where the prevailing party has rights under an attorney's fee statute as well as substantive rights. There would be no net judicial economy, but if anything a net diseconomy, if we held that we could not consider the merits of the fee order until the amount of fees to be awarded is fixed. We think we can.

Id. at 827.

Eleventh Circuit

The Eleventh Circuit followed the lead of the Sixth and Seventh Circuits in *Andrews v. Employees' Retirement Plan of First Alabama Bancshares, Inc.*, 938 F.2d 1245 (11th Cir. 1991). The court relied on the general principle that the appellate court has jurisdiction to review a non-appealable

aspect of a district court order when that order is otherwise properly before the court. *Id.* at 1247-48 (citing *Stewart v. Baldwin County Board of Education*, 908 F.2d 1499, 1509 (11th Cir. 1990); *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 847 (5th Cir. 1977)).

B. Circuits remaining within statutory jurisdictional limits:

Third Circuit

The Third Circuit recently reaffirmed its position that it is not at liberty to carve out an exception to the rule that appellate courts must review only final judgments under 28 U.S.C. § 1291 in *Pennsylvania v. Flaherty*, 983 F.2d 1267, 1276-77 (3d Cir. 1993). In that case, the court reviewed the various circuit court decisions and their rationales, and declined to adopt a liberal view of any exception to the general rule. Relying on its response to the judicial economy argument made in an earlier decision, *Becton Dickinson & Co. v.*

District 65, United Automobile, Aerospace & Agricultural Implement Workers, 799 F.2d 57 (3d Cir. 1986), the court reiterated:

> In the interest of our concern for judicial economy, we concluded that deciding the merits of the attorney's fee issue would not preclude the likelihood of a second appeal on the actual amount awarded after the fee determination, and held that "the jurisdictional rules precluding review of non-final orders [is] ... firmly entrenched."

Flaherty, 983 F.2d at 1277 (quoting *Becton*, 799 F.2d at 61-62.)

Fifth Circuit

Unlike the court's action in the instant case, in *Southern Travel Club v. Carnival Air Lines*, 986 F.2d 125 (5th Cir. 1993), the Fifth Circuit carefully considered its jurisdictional limits over non-final orders, weighed the arguments, and concluded that it had no jurisdiction to review an order granting an unspecified amount of attorney's fees. In that opinion, the court analyzed the Seventh Circuit's justification

in *Bittner*, but rejected it for two reasons. First, it held that jurisdictional rules of review are "firmly entrenched". Second, the court noted that the exception had the potential to generate confusion among parties as to when the appellate timetable begins to run to file a notice of appeal on an order awarding sanctions. This concern is well-founded, as was demonstrated by the Sixth Circuit's rule that resulted in such confusion in *Morgan v. Union Metal Manufacturing*, 757 F.2d 792 (6th Cir. 1985) (discussed *supra*) and deprived the appellant of his right to appeal the decision on the merits of his case.

Tenth Circuit

In *Phelps v. Washburn University*, 807 F.2d 153 (10th Cir. 1986), the court specifically declined to follow the Seventh Circuit's decision of *Bittner* as well as that circuit's decision in another case to hold its decision until the district court set the amount of the fee award. *See Herschinow v. Bonamarte*, 735 F.2d 264, 267 (7th Cir. 1984). The Tenth Circuit recognized that its appellate jurisdiction was not

BEST AVAIL

discretionary, and therefore, it was incapable of creating an exception which would expand that authority.

II. EFFECT OF SETTLEMENT ON JUDGMENT SANCTIONING COUNSEL FOR A SETTLING PARTY

Few cases exist in which the district court imposed sanctions on the attorney for one of the parties settling their dispute with another party. In addition to the instant case, two other circuits have faced this issue and reached opposite conclusions. In the case before this Court, the Fifth Circuit rejected Koerner's argument that he was not liable for attorney's fees once the parties had completely settled the underlying cause of action. Instead, the court held that Koerner was bound by the district court's decision and the settlement in which ICC and Nottebohm reserved their rights against Koerner. This decision contrasts starkly with the district court's earlier holding that Koerner did not have standing to challenge the settlement or receive a credit for the work which he performed under a contingency fee contract as

ABLE COPY

a set off against any attorney's fees owed. The lower courts also refused to credit Koerner for the money and other consideration received by ICC from its settlement with Old Time.

In *Riverhead Savings Bank v. National Mortgage Equity Corporation*, 893 F.2d 1109 (9th Cir. 1990), the court held that the appeal of the sanctions issue was moot where the party owing the monetary sanction settled with the party entitled to receive that money. The court distinguished its facts from the situation where attorney's fees are payable directly to the clerk of court pursuant to the court's inherent powers and not subject to revocation by the parties. The Ninth Circuit's position possesses the laudable effect of promoting post-judgment settlement by assuring parties and their attorneys that a settlement will have the effect of concluding all issues, collateral and otherwise, of the litigation.

In contrast, the Eight Circuit has affirmed a district court's decision to enforce sanctions against a party and her

attorney after that party had settled with the opposing party. *Perkins v. General Motors Corporation*, 965 F.2d 597 (8th Cir. 1992). There, the appellate court refused to vacate a district court order imposing non-monetary sanctions, despite an agreement by the defendant not to collect monetary sanctions. The Eighth Circuit's unwillingness to recognize parties' terms of settlement will have a chilling effect on settlement negotiations. Under this approach, sanctioned parties have far less incentive to settle their disputes once a sanctions order has been entered because they know that even if they bargain with the opposing party to forego the sanctions, they may still be liable for them based on the whim on the district court. This Honorable Court should grant a writ to consider this issue and remind the lower courts of the general federal policy of promoting settlement whenever possible.

Moreover, this Court should grant a writ because the Fifth Circuit departed from its own precedent and general federal common law which requires trial courts to determine

whether liability to a party is reduced by its settlement with another party. *See McDermott, Inc. v. Clyde Iron*, 979 F.2d 1068, 1079 (5th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3653 (U.S. Mar. 12, 1993 (No. 92-1479); *Williams v. Fab-Con*, No. 92-3320, slip op. at 10-11 (5th Cir. May 6, 1993) and the cases cited therein. In *McDermott*, the Fifth Circuit held that the party receiving a monetary settlement carries the burden of proof to show that it is not receiving a double recovery if liability is later imposed on another party (or even non-party, as in the instant case.) Where that party cannot demonstrate that the settlement amount paid represents a separate obligation from the amount sought from the non-settling party, then the non-settling party is entitled to a credit for the amount of the settlement.

In the instant case, ICC received some $60,000.00 from Old Time in full satisfaction of its claims on open account and unquantified sanctions judgment against Old Time, as well as a release from Old Time of its bankruptcy preference litigation.

BEST AV

The settlement did not allocate particular amounts between the open account claims owed solely by Old Time and the sanctions judgment owed initially by Old Time, and later, by Koerner. Without making such a distinction, ICC cannot carry its burden of showing that the proceeds of the settlement were not for the sanctions. Therefore, Koerner is entitled to a dollar-for-dollar credit against his judgment.

Finally, this issue represents an important question of federal law which has not been, but should be decided by this Court. With the increasing of use of sanctions by lower courts against attorneys, the scenerio in the instant case is likely to be played out in future cases. Parties, fearing the wrath of a trial court which has indicated that it will impose sanctions, will settle with their opponents and leave their attorney holding the bag. Attorneys are entitled to the same protection as other persons who are cast in judgment after other persons have settled out of court. That is, they are entitled to reduce their liability either by the amount of the settlement or by the pro

ILABLE COPY

rata share of the settling party. The lower courts in the instant case did not even consider the equities of this argument, much less give Koerner the credit which he deserved under federal law. Therefore, this Court should review .his issue and instruct the lower courts accordingly.

CONCLUSION

This case raises two important issues relating to Rule 11 of the Federal Rules of Civil Procedure on which the federal appellate courts diverge drastically. This Honorable Court has never addressed either issue, and a writ should be granted to allow this Court to resolve the issues and provide guidance to the lower federal courts.

LOUIS R. KOERNER, JR., ESQ.
OF THE LOUISIANA BAR
1204 JACKSON AVENUE
NEW ORLEANS, LA 70130-5130
(504) 581-9569

CONTENTS TO APPENDIX

1. *Old Time Enterprises, Inc. v. Browning*,, No. 91-3870 (5th Cir. January 5, 1993.) (Opinion.)

2. *Old Time Enterprises, Inc. v. International Coffee Corp.*, C.A. No. 89-1371(H) (United States District Court, Eastern District of Louisiana, September 10, 1991) (Minute Entry).

3. *Old Time Enterprises, Inc. v. International Coffee Corp.*, No. 89-3763 (5th Cir. July 12, 1990.)

4. *Old Time Enterprises, Inc. v. International Coffee Corp.*, C.A. No. 89-1371(H) (United States District Court, Eastern District of Louisiana, October 25, 1989) (Order and Reasons).

5. *Old Time Enterprises, Inc. v. International Coffee Corp.*, C.A. No. 89-1371(H) (United States District Court, Eastern District of Louisiana, August 18, 1989) (Judgment).

6. *Old Time Enterprises, Inc. v. International Coffee Corp.*, C.A. No. 89-1371(H) (United States District Court, Eastern District of Louisiana, August 17, 1989) (Order and Reasons).

7. *Old Time Enterprises, Inc. v. Browning*, No. 91-3870 (5th Cir. February 16, , 1993) (Rehearing Denied.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3870

OLD TIME ENTERPRISES, INC.,

Plaintiff,

VERSUS

MICHAEL L. BROWNING, et al.,

Defendants,

INTERNATIONAL COFFEE CORP. and
CARLOS NOTTEBOHM

Defendants -Appellees,

VERSUS

LOUIS R. KOERNER, JR.,
Movant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-89-1371 (H))

Before REAVLEY, SMITH, and EMILIO M. GARZA,

Circuit Judges.

JERRY E. SMITH, Circuit Judge:* *

---

* 'Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular

Louis R. Koerner, Jr., challenges the district court's imposition of sanctions imposed pursuant to Fed. R. Civ. P. 11, contending that the district court insufficiently supported its ruling and that Koerner was not a proper party to sanction. Finding no merit in these contentions, we affirm.

I.

In 1986, Old Time Enterprises, Inc. ("Old Time"), filed a Racketeer Influenced and Corrupt Organizations Act ("RICO") complaint against International Coffee Corporation ("ICC") and several of its officers, including Carlos Nottebohm. The district court dismissed the complaint, and we affirmed but modified the dismissal to be without prejudice. *Old Time Enters. v. Int'l Coffee Corp.*, 862 F.2d 1213, 1219-20 (5th Cir. 1989).

In 1989, Old Time filed a second RICO complaint in-

---

cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

volving the same business relationships among the same parties. ICC moved to dismiss the complaint and moved for sanctions against Old Time and its attorney, Louis Koerner.

On August 18, 1989, the district court found in favor of ICC and imposed, but did not fix the amount of, sanctions for the costs associated with filing the RICO claim. The district court found that Old Time's 150-page RICO claim was "vague, confusing, and . . . essentially incomprehensible." Specifically, the court objected to paragraphs referenced within paragraphs and a muddled jumble of attached schedules and exhibits. The court went on to show that Old Time's complaint was "woefully inadequate" because it attempted to establish the existence of a RICO "enterprise" only through conclusionary allegations and irrelevant documents. Finally, the court determined that this fourth set (including amended complaints) of unclarified generalities that Old Time threw together "failed once again even to approach compliance with the requirements so clearly outlined" previously.

The next day the district court entered judgment and imposed sanctions in favor of the defendants and against the plaintiff, Old Time, without mentioning Koerner by name. In an amended notice of appeal, Koerner wrote, "Louis R. Koerner, Jr. hereby appeals from all orders granting sanctions. . . . and any other final or interlocutory order that affects or is adverse to his interests." In an unpublished opinion, *Old Time Enters. v. Int'l Coffee Corp.*, No. 89-3763 (5th Cir. July 12, 1990), we affirmed the judgment in all respects.

ICC then filed a motion to fix the amount of sanctions at $47,373.58, representing attorneys' fees and costs. Before the district court ruled on this motion, Old Time and ICC reached a settlement, as part of which ICC agreed not to pursue sanctions against Old Time but specifically reserved its right to do so against Koerner. After the settlement, the court held a hearing on the sanctions issue, at which Koerner argued that because the district court had never imposed sanctions on him by name, he was not liable. The court disagreed, affirming that the August 18, 1989,

order had intended to impose sanctions on Koerner.

After the hearing, ICC filed a second motion for sanctions and submitted documentation justifying its costs and fees. On September 10, the district court ruled on sanctions. It considered "all of the circumstances, including the total expenses which have been incurred, Mr. Koerner's relative impecuniosity, and the necessity for deterrence . . ." and ordered Koerner to pay a total of $25,000 ($12,500 to each of ICC and Nottebohm) in sanctions.

II.

We review "all aspects" of a district court's award of sanctions under an abuse of discretion standard. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). *See also Thomas v. Capital Sec. Servs.*, 836 F.2d 866, 872 (5th Cir. 1988) (en banc); *Akin v. Q-L Invs.*, 959 F.2d 521, 534 (5th Cir. 1992). Under this standard, we shall not reweigh evidence and reconsider facts already weighed and considered by the district court. *Cooter & Gell*, 496 U.S. at 404. Rather, we shall uphold a district court's award of sanctions if that court has offered substantial justification for finding a rule

11 violation. *Id.* at 405.

In *Thomas*, 836 F.2d at 883, we explicitly stated that a district court need not make specific findings and conclusions in all rule 11 cases. We did stress "the importance of an adequate record for appellate review in those cases in which the violation is not apparent on the record and the basis and justification for the trial judge's Rule 11 decision is not discernible." *Id.* In other words, we shall rigorously review the district court's award of sanctions to ICC in order to ensure that justification for the district court's decision is present in the record.

Koerner basically argues two points on appeal. First, he contends that the district court failed to make detailed findings necessary to back up its imposition of severe monetary sanctions. By omitting such findings, Koerner asserts that the district court has abused its discretion and we must remand.

We disagree. In *Thomas, id.*, we specifically chose not to force district courts to make detailed factual findings every time they award sanctions. In *Willy v. Coastal Corp.*,

915 F.2d 965, 966 (5th Cir. 1990), we confronted a similar situation in which the district court sanctioned an attorney who filed a 110-page motion for summary judgment along with 1200 pages of unorganized supporting material. The district court found that the attorney had filed confusing, misleading pleadings, including a baseless RICO claim, and assessed $19,307 in rule 11 sanctions. *Id.* at 966, 968. We reviewed the record and, given the district court's better position to marshal the necessary facts and figures, found that it disclosed ample support for the district court's determination of the amount of sanctions. *Id.* at 968.

In *Jennings v. Joshua Indep. School Dist.*, 948 F.2d 194, 199 (5th Cir. 1991), we emphasized another restriction on rule 11 cases: Sanctions must be limited to expenses directly caused by filing the baseless complaint in the district court. A further requirement we have placed on sanctions is that they be the "least severe sanction" adequate to accomplish the purposes of rule 11.

Our review of the record shows that the district court did not abuse its discretion in awarding sanctions of

$25,000. The record shows that ICC spent $47,373.58 to defend itself from Old Time's baseless RICO claims. The district court considered this amount and then reduced it. It felt the less severe sanction of $25,000 better suited the purposes of rule 11. Following the lessons of the Supreme Court in *Cooter & Gell* and our own words in *Thomas*, we shall not reconsider the district court's determination of the appropriate amount of sanctions, as the record adequately reflects the district court's choice of the amount of sanctions. It considered all of the circumstances and concluded that $25,000 was the least severe sanction necessary to implement the policy of rule 11.

Koerner's second main contention is that the district court inappropriately sanctioned him in that the court did not mention him by name in its August 18, 1989, order imposing sanctions. Koerner first argues that when we affirmed that order in 1990 without mentioning him, we rendered the sanctions claim *res judicata*. We do not accept this argument: The district court still retained the power to decide the amount of sanctions and the parties to be

sanctioned.

An award of attorneys' fees is collateral to the merits of an action. *Deloach v. Delchamps Inc.*, 897 F.2d 815, 826 (5th Cir. 1990). The district court had not set the amount of sanctions in its August 18 order or August 19 judgment. It explicitly stated that it would hold a hearing at a later date to determine the specifics of the sanction award. When we affirmed the judgment, we did not make all of its aspects *res judicata*, but only the fact that sanctions would be forthcoming.

Next, Koerner argues that the settlement between Old Time and ICC, which gave up pursuit of sanctions against Old Time, meant that no sanctions could be imposed on Koerner. Quite the opposite is true. Once a court has determined that a party has violated rule 11, the court is duty-bound to impose some form of sanctions on that party. *Thomas*, 836 F.2d at 876. The court found that Koerner, as signer of the pleadings, had violated rule 11. It therefore rightfully sanctioned Koerner, regardless of any settlement between Old Time and ICC.

Koerner cannot now claim that he had no knowledge that he was to be sanctioned. In the notice of appeal filed right after the August 19, 1989, judgment, Koerner writes that he appeals any sanctions adverse to his interests. In the settlement negotiations between Old Time and ICC, ICC specifically reserved its rights to pursue sanctions against Koerner. Koerner obviously had knowledge that the sanctions referred to in the August 18 order referred to him. As an attorney who signed the sanctionable pleadings, Koerner knew, from the district court's first mention of sanctions, that he was liable for them.

For the foregoing reasons, we AFFIRM the decision of the district court.

MINUTE ENTRY
DUPLANTIER, J.
SEPTEMBER 10, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT Of LOUISIANA

OLD TIME ENTERPRISES, INC.	CIVIL ACTION
VERSUS	NO. 89-1371
INTERNATIONAL COFFEE CORP., WILLIAM G. MADARY, MICHAEL L. BROWNING, CARLOS L. NOTTEBOHM AND CLIFFORD SPUHLER	SECTION "H"

The motion of International Coffee Corporation and Carlos Nottebohm for Rule 11 sanctions was granted on an earlier date. On August 28, 1991, the motion to fix amount and for further sanctions was taken under advisement. For the following reasons, Louis Koerner is ordered to pay $12,500 to defendant International Coffee Corporation and $12,500 to defendant Carlos Nottebohm as sanctions.

Movers contend that Louis Koerner should be compelled to pay nearly $29,000 to Carlos Nottebohm and nearly $28,000 to International Coffee Corp., the amounts which they claim to have expended in defense of sanction-

able conduct. Without attempting to analyze each of the claimed expenditures, I consider all of the circumstances, including the total expenses which have been incurred, Mr. Koerner's relative impecuniosity, and the necessity for deterrence. In my judgment, imposition of the total monetary sanction of $25,000 accomplishes the purpose of Rule 11.

The motion to dismiss the motion for sanctions filed by Mr. Koerner is DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-3763

OLD TIME ENTERPRISES, INC.,

Plaintiff-Appellant,

versus

INTERNATIONAL COFFEE CORP., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-89-1371-"H"(2))

(July 12, 1990)

Before GEE, POLITZ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

This matter returns on appeal following our remand,

---

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Old Time Enterprises v. International Coffee Corp., 862 F.2d 1213 (5th Cir. 1989). The district court dismissed the complaint with prejudice for failure to comply with its standing RICO order and for failure to state a claim. Old Time Enterprises, Inc. appeals that dismissal as well as the district court's refusal to permit the filing of another amended complaint and its imposition of Fed. R. Civ. P. 11 sanctions. Upon consideration of the record, briefs, and arguments of counsel, and finding neither error nor abuse of discretion, the judgment of the district court is AFFIRMED in all respects.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

OLD TIME ENTERPRISES, INC.	CIVIL ACTION
VERSUS	NUMBER 89-1371
INTERNATIONAL COFFEE CORPORATION, ET AL	SECTION "H"

ORDER AND REASONS

Before the court are plaintiff's motion for leave to file an amended RICO complaint, its motion for reconsideration, and defendant Nottebohm's motion for a protective order. For the following reasons, plaintiff's motions are denied, and defendant Nottebohm's motion for a protective order is dismissed as moot.

Plaintiffs' Motion for
Leave to File an Amended RICO Complaint

Plaintiff moves for leave of the court to file an amended RICO complaint. In support of this motion, plaintiff argues that it has a "right" to amend as a matter of course; alternatively, that it should be granted leave to amend in the interest of justice.

Plaintiff asserts that leave to amend its complaint was first requested in its opposition to defendants' motion to dismiss, and therefore it may amend as a matter of course pursuant to Fed.R.Civ.P. 15(a). Suffice it to say that if plaintiff had any grounds for amending, it should have attempted to amended its complaint as a matter of right at that time. *See Glen v. First National Bank In Grand Junction*, 868 F.2d 368 (10th Cir. 1989). In response to defendant's motion to dismiss plaintiff chose to stand on the validity of its complaint, requesting in the alternative that we permit it to amend the complaint should we find it lacking. *See* Plaintiff's Memorandum in Opposition to Motion to Dismiss at 1. Such a request does not rise to the status of a motion. *Glen, supra* at 370. Moreover, we disagree with plaintiff's characterization of its complaint as a "first" amended complaint. Such a characterization ignores the protracted history of this litigation.

We also disagree with plaintiff's claim that it is in the interest of justice to grant its motion for leave to amend. To the contrary, justice dictates that we deny plaintiff's re-

quest. Plaintiff has had several opportunities to state a claim, and has yet to do so. Furthermore, the proposed amended complaint does not state a claim with the clarity required by our standing RICO Order. *See* Moore's Fed. Prac. ¶ 15.10 at p. 15-106. Defendants have been forced to expend a vast amount of legal resources to defend a suit based on facially insufficient pleadings. Such litigation can not go on indefinitely.

Plaintiff's Motion for Reconsideration

Plaintiff moves for reconsideration of our judgment dismissing its complaint and imposing sanctions.

We disagree with plaintiff's claim that the Court of Appeals decision gives plaintiff the right to begin this litigation anew. While plaintiff's inability to comply with our Standing RICO Order may have been understandable in light of the unsettled nature of the case law at the time the original complaint was filed, it is clear that such defects are not to be tolerated in subsequent pleadings. *Old Time Enterprises Inc. v. International Coffee Corporation,* 862

F.2d 1213, 1220 (1989). Plaintiff has failed to state any meritorious grounds for relief from our judgment, under either Federal Rule 59 or 60.

Nottebohm's Motion for a Protective Order

In light of our findings above, defendant Nottebohm's motion for a protective order is dismissed as moot.

October 25, 1989

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

OLD TIME ENTERPRISES, INC.	CIVIL ACTION
VERSUS	NO. 89-1371
INTERNATIONAL COFFEE CORP., WILLIAM G. MADARY, MICHAEL L. BROWNING, CARLOS L. NOTTEBOHM AND CLIFFORD SPUHLER	SECTION "H"

JUDGMENT

Considering the court's Order and Reasons filed herein on August 17, 1989, and further considering the court's direction as to entry of judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, International Coffee Corporation, Michael L. Browning, Clifford Spuhler, William G. Madary, and Carlos L. Nottebohm, and against plaintiff, Old Time Enterprises, Inc., dismissing plaintiff's complaint and imposing sanctions for those costs incurred due to plaintiff's failure to conform to the court's RICO Standing Order.

New Orleans, Louisiana, this 18th day of August,

1989.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

OLD TIME ENTERPRISES, INC.	CIVIL ACTION
VERSUS	NUMBER 89-1371
INTERNATIONAL COFFEE CORPORATION, ET AL	SECTION "H"

ORDER AND REASONS

Before the court are a Motion to Strike, to Dismiss and for Sanctions filed on behalf of defendant Carlos Nottebohm; a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted filed on behalf of defendants International Coffee Corporation, William Madary, Michael Browning, and Clifford Spuhler [hereinafter International Defendants]; and a Motion for Order Confirming Adequacy of Compliance with RICO Standing Order filed on behalf of the plaintiff, Old Time Enterprises. For the following reasons, Nottebohm's and International Defendants' motions are granted, and plaintiff's motion for an order confirming the adequacy of compliance with the court's RICO Standing Order is denied.

Judgment will be entered dismissing plaintiff's complaint and imposing sanctions for those costs incurred due to plaintiff's failure to conform to the court's RICO Standing Order.

This is plaintiff's second RICO complaint involving the same business relationships among the parties. We dismissed Old Time's previous RICO complaint; the Fifth Circuit affirmed but modified the dismissal to be without prejudice. *Old Time Enterprises v. Intern. Coffee Corp.*, 862 F.2d 1213, 1220 (5th Cir. 1989). This second complaint was filed after considerable discovery and entry of a RICO Standing Order in the previous litigation; it is nearly 150 pages long, including attached schedules, and incorporates the plaintiff's response to our RICO Standing Order. In spite of repeated direction from this court and the Fifth Circuit, many of the defects apparent in the plaintiff's previous submissions are present in this complaint as well.

Since the basis of plaintiff's RICO claim is fraud, in addition to providing "simple concise and direct" statements in the pleadings, the plaintiff must plead its allegations

with factual specificity. Fed.R.Civ.P. 8(a) & 9(b); *Old Time, supra*. at 1217. The purpose of these rules is to insure that a RICO claim is pleaded "with sufficient intelligibility for a court or opposing party to understand whether a valid claim is alleged and if so what it is." *Id.* at 1218

Moreover, after the plaintiff has been given notice of the pleading requirements, as is the case here, a district court and opposing parties are not required to sift forever through non-conforming pleadings. *Id.* at 1219. The clarity and intelligibility required by the Federal Rules of Civil Procedure are simply absent from the complaint before us. Like the plaintiff's previously dismissed complaint, this document contains vague, confusing, and meaningless cross-referencing which make it essentially incomprehensible. *Id.* at 1218.

For example, in response to RICO Standing Order No. 11, ¶ 9 of the complaint refers to paragraphs referenced within paragraphs, ultimately incorporating over half of the 109 paragraph complaint. Likewise, the plaintiff responds to Standing Order No. 8 stating, "see the discussion in ¶¶

40-86." Paragraphs 40-86 refer to and incorporate a majority of the complaint as well, and also reference a host of attached schedules and exhibits. The Fifth Circuit has previously cautioned plaintiff about the impropriety of such responses to our Standing Order: such broad and sweeping statements are "woefully inadequate". *Id.* at 1219. In spite of instructions from this court and the Fifth Circuit, the confusing cross-referencing is repeated throughout the complaint.

The complaint is also defective in that the plaintiff attempts to establish the existence of a RICO "enterprise" by pleading in ¶¶ 90-96, conclusory allegations supported only by a host of irrelevant documents.[1] 1 For example, such comments as "Spuhler represented himself as the authorized representative of 'Shadow' Old Time," in ¶ 92 are nonsense. The term "Shadow" Old Time was unknown

[1] The documents referenced by the plaintiff in ¶¶ 90-96 may be relevant to the establishment of the predicate acts of a "pattern of racketeering", but they do not aid in the establishment of an "enterprise."

to Spuhler prior to its invention at oral argument in this case's appeal. Furthermore, the documents referred to in ¶ 92 (schedule BR4.SYF) fail to indicate, on their face, any evidence of the alleged "Shadow" enterprise. Thus, the statement and the documents cited in support of it are meaningless in this context. Suffice it to say that such unclarified generalities and conclusory allegations do not state a cause of action. *Id.* at 1219.

Throughout the complaint, the plaintiff also confuses the establishment of a RICO enterprise with the predicate acts necessary to prove a pattern of racketeering activity. For example, "the unauthorized use as a RICO enterprise of the name and roaster contracts of Old Time Enterprises, Inc.," is simply not an allegation that establishes "Shadow" Old Time as an interstate enterprise and cannot possibly constitute a RICO claim. *See* Complaint, at ¶ 90 (relying on this description to establish "Shadow" Old Time's status throughout the complaint); *see also Old Time, supra*, at 1217 (the Fifth Circuit explaining that such allegations can not possibly constitute a RICO claim).

A careful reading of the plaintiff's complaint in a light most favorable to it, shows that it has failed to establish the existence of a RICO enterprise separate and apart from the pattern of activity from which it allegedly engaged as required by the Fifth Circuit in *Old Time, supra.*, and *Atkinson v. Anadarko Bank and Trust Co.*, 808 F.2d 438 (5th Cir. 1987), *cert. denied* 483 U.S. 1032. We are not convinced to the contrary by plaintiff's circular reasoning that because "Shadow" Old Time allegedly was used to engage in patterns of racketeering, the enterprise and the patterns are "obviously separate". *See* Old Time's Memorandum in Opposition to International Defendants' Motion to Dismiss, Record Doc. 31, at 6. To withstand a motion to dismiss, "a complaint must affirmatively state a cause of action not merely fail to negate the existence of one." *Old Time, supra,* at 1220.

Plaintiff's allegations that false representations made in connection with pending litigation constitute mail fraud add nothing. We agree with the district courts that have so held and adopt their reasoning. *See Morin v.*

Trupin, 711 F.Supp. 97 (S.D. N.Y. 1989); *McMurty v. Brasfield*, 654 F.Supp. 1222 (E.D.Va. 1987); *Paul S. Mullin & Assoc, Inc. v. Bassett*, 632 F.Supp. 532 (D.Del. 1986); *Spiegel v. Continental Ill. Nat. Bank*, 609 F.Supp. 1083 (N.D.Ill.1985), *aff'd.*, 790 F.2d 638 (7th Cir 1986), *cert. denied*, 479 U.S. 987.

This complaint is the fourth time that the plaintiff has had the opportunity to comply with the RICO Standing Order; it has failed once again even to approach compliance with the requirements so clearly outlined in *Old Time, supra*. Thus, sanctions are appropriate pursuant to Fed.R. Civ.P. 11. *See Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988) (en Banc). The court will fix the amount of sanctions after a contradictory hearing on motion of defendants.

New Orleans, Louisiana, this 17th day of August, 1989.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-3870

OLD TIME ENTERPRISES, INC.,

Plaintiff,

VERSUS

MICHAEL L. BROWNING, et al.,

Defendants,

INTERNATIONAL COFFEE CORP. and
CARLOS NOTTEBOHM

Defendants -Appellees,

VERSUS

LOUIS R. KOERNER, JR.,

Movant-Appellant.

ON PETITION FOR REHEARING

(February 16, 1993)

Appeal from the United States District Court
for the Eastern District of Louisiana

Before REAVLEY, SMITH, and EMILIO M. GARZA,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:
Jerry E. Smith
United States Circuit Judge